

FIRST REGULAR SESSION

# SENATE BILL NO. 636

94TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR LOUDON.

Read 1st time February 28, 2007, and ordered printed.

TERRY L. SPIELER, Secretary.

1647S.04I

## AN ACT

To repeal sections 565.005, 565.006, 565.035, and 565.040, RSMo, and to enact in lieu thereof eight new sections relating to aggravated child kidnapping, with penalty provisions.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Sections 565.005, 565.006, 565.035, and 565.040, RSMo, are  
2 repealed and eight new sections enacted in lieu thereof, to be known as sections  
3 565.005, 565.006, 565.035, 565.040, 565.400, 565.405, 565.410, and 565.415, to  
4 read as follows:

565.005. 1. At a reasonable time before the commencement of the first  
2 stage of any trial of murder in the first degree **or aggravated child**  
3 **kidnapping** at which the death penalty is not waived, the state and defendant,  
4 upon request and without order of the court, shall serve counsel of the opposing  
5 party with:

6 (1) A list of all aggravating or mitigating circumstances as provided in  
7 [subsection 1 of] section 565.032 **for murder in the first degree or section**  
8 **565.415 for aggravated child kidnapping**, which the party intends to prove  
9 at the second stage of the trial;

10 (2) The names of all persons whom the party intends to call as witnesses  
11 at the second stage of the trial;

12 (3) Copies or locations and custodian of any books, papers, documents,  
13 photographs or objects which the party intends to offer at the second stage of the  
14 trial. If copies of such materials are not supplied to opposing counsel, the party  
15 shall cause them to be made available for inspection and copying without order  
16 of the court.

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.**

17           2. The disclosures required in subsection 1 of this section are  
18 supplemental to those required by rules of the supreme court relating to a  
19 continuing duty to disclose information, the use of matters disclosed, matters not  
20 subject to disclosure, protective orders, and sanctions for failure to comply with  
21 an applicable discovery rule or order, all of which shall also apply to any  
22 disclosure required by this section.

565.006. 1. At any time before the commencement of the trial of a  
2 homicide **or aggravated child kidnapping** offense, the defendant may, with  
3 the assent of the court, waive a trial by jury and agree to submit all issues in the  
4 case to the court, whose finding shall have the force and effect of a verdict of a  
5 jury. Such a waiver must include a waiver of a trial by jury of all issues and  
6 offenses charged in the case, including the punishment to be assessed and  
7 imposed if the defendant is found guilty.

8           2. No defendant who pleads guilty to a homicide **or aggravated child**  
9 **kidnapping** offense or who is found guilty of a homicide **or aggravated child**  
10 **kidnapping** offense after trial to the court without a jury shall be permitted a  
11 trial by jury on the issue of the punishment to be imposed, except by agreement  
12 of the state.

13           3. If a defendant is found guilty of murder in the first degree **or**  
14 **aggravated child kidnapping** after a jury trial in which the state has not  
15 waived the death penalty, the defendant may not waive a jury trial of the issue  
16 of the punishment to be imposed, except by agreement with the state and the  
17 court.

18           4. Any waiver of a jury trial and agreement permitted by this section shall  
19 be entered in the court record.

565.035. 1. Whenever the death penalty is imposed in any case, and upon  
2 the judgment becoming final in the trial court, the sentence shall be reviewed on  
3 the record by the supreme court of Missouri. The circuit clerk of the court trying  
4 the case, within ten days after receiving the transcript, shall transmit the entire  
5 record and transcript to the supreme court together with a notice prepared by the  
6 circuit clerk and a report prepared by the trial judge. The notice shall set forth  
7 the title and docket number of the case, the name of the defendant and the name  
8 and address of his attorney, a narrative statement of the judgment, the offense,  
9 and the punishment prescribed. The report by the judge shall be in the form of  
10 a standard questionnaire prepared and supplied by the supreme court of  
11 Missouri.

12           2. The supreme court of Missouri shall consider the punishment as well  
13 as any errors enumerated by way of appeal.

14           3. With regard to the sentence, the supreme court shall determine:

15           (1) Whether the sentence of death was imposed under the influence of  
16 passion, prejudice, or any other arbitrary factor; and

17           (2) Whether the evidence supports the jury's or judge's finding of a  
18 statutory aggravating circumstance as enumerated in subsection 2 of section  
19 565.032 **or subsection 2 of section 565.415** and any other circumstance found;

20           (3) Whether the sentence of death is excessive or disproportionate to the  
21 penalty imposed in similar cases, considering both the crime, the strength of the  
22 evidence and the defendant.

23           4. Both the defendant and the state shall have the right to submit briefs  
24 within the time provided by the supreme court, and to present oral argument to  
25 the supreme court.

26           5. The supreme court shall include in its decision a reference to those  
27 similar cases which it took into consideration. In addition to its authority  
28 regarding correction of errors, the supreme court, with regard to review of death  
29 sentences, shall be authorized to:

30           (1) Affirm the sentence of death; or

31           (2) Set the sentence aside and resentence the defendant to life  
32 imprisonment without eligibility for probation, parole, or release except by act of  
33 the governor; or

34           (3) Set the sentence aside and remand the case for retrial of the  
35 punishment hearing. A new jury shall be selected or a jury may be waived by  
36 agreement of both parties and then the punishment trial shall proceed in  
37 accordance with this chapter, with the exception that the evidence of the guilty  
38 verdict shall be admissible in the new trial together with the official transcript  
39 of any testimony and evidence properly admitted in each stage of the original  
40 trial where relevant to determine punishment.

41           6. There shall be an assistant to the supreme court, who shall be an  
42 attorney appointed by the supreme court and who shall serve at the pleasure of  
43 the court. The court shall accumulate the records of all cases in which the  
44 sentence of death or life imprisonment without probation or parole was imposed  
45 after May 26, 1977, or such earlier date as the court may deem appropriate. The  
46 assistant shall provide the court with whatever extracted information the court  
47 desires with respect thereto, including but not limited to a synopsis or brief of the

48 facts in the record concerning the crime and the defendant. The court shall be  
49 authorized to employ an appropriate staff, within the limits of appropriations  
50 made for that purpose, and such methods to compile such data as are deemed by  
51 the supreme court to be appropriate and relevant to the statutory questions  
52 concerning the validity of the sentence. The office of the assistant to the supreme  
53 court shall be attached to the office of the clerk of the supreme court for  
54 administrative purposes.

55 7. In addition to the mandatory sentence review, there shall be a right of  
56 direct appeal of the conviction to the supreme court of Missouri. This right of  
57 appeal may be waived by the defendant. If an appeal is taken, the appeal and  
58 the sentence review shall be consolidated for consideration. The court shall  
59 render its decision on legal errors enumerated, the factual substantiation of the  
60 verdict, and the validity of the sentence.

565.040. 1. In the event that the death penalty provided in this chapter  
2 is held to be unconstitutional, any person convicted of murder in the first degree  
3 **or aggravated child kidnapping** shall be sentenced by the court to life  
4 imprisonment without eligibility for probation, parole, or release except by act of  
5 the governor, with the exception that when a specific aggravating circumstance  
6 found in a case is held to be unconstitutional or invalid for another reason, the  
7 supreme court of Missouri is further authorized to remand the case for  
8 resentencing or retrial of the punishment pursuant to subsection 5 of section  
9 565.036.

10 2. In the event that any death sentence imposed pursuant to this chapter  
11 is held to be unconstitutional, the trial court which previously sentenced the  
12 defendant to death shall cause the defendant to be brought before the court and  
13 shall sentence the defendant to life imprisonment without eligibility for  
14 probation, parole, or release except by act of the governor, with the exception that  
15 when a specific aggravating circumstance found in a case is held to be  
16 inapplicable, unconstitutional or invalid for another reason, the supreme court  
17 of Missouri is further authorized to remand the case for retrial of the punishment  
18 pursuant to subsection 5 of section 565.035.

**565.400. 1. A person commits the crime of aggravated child**  
2 **kidnapping if such person is not a relative of the child within the third**  
3 **degree and, after deliberation upon the matter, such person:**

4 (1) (a) Unlawfully removes a child under the age of eighteen  
5 without the consent of such child's parent or guardian from the place

6 where such child is found; or

7 (b) Unlawfully confines a child under the age of eighteen without  
8 the consent of such child's parent or guardian; and

9 (2) (a) Commits a sexual act involving the penetration, however  
10 slight, of the male or female sex organ or the anus by a finger,  
11 instrument or object done for the purpose of arousing or gratifying the  
12 sexual desire of any person or for the purpose of terrorizing the victim;  
13 or

14 (b) Has sexual intercourse with the person by the use of forcible  
15 compulsion. "Forcible compulsion" includes the use of a substance  
16 administered without a victim's knowledge or consent which renders  
17 the victim physically or mentally impaired so as to be incapable of  
18 making an informed consent to sexual intercourse.

19 2. Aggravated child kidnapping is a felony and the punishment  
20 shall be either death or imprisonment for life without eligibility for  
21 probation or parole, or release except by act of the governor; except  
22 that, if a person has not reached his or her sixteenth birthday at the  
23 time of the commission of the crime, the punishment shall be  
24 imprisonment for life without eligibility for probation or parole, or  
25 release except by act of the governor.

565.405. 1. Except as provided in subsections 2, 3, and 4 of this  
2 section, no aggravated child kidnapping offense may be tried together  
3 with any offense other than aggravated child kidnapping. In the event  
4 of a joinder of aggravated child kidnapping offenses, all offenses  
5 charged which are supported by the evidence in the case shall, when  
6 requested by one of the parties or the court, be submitted to the jury  
7 or, in a jury-waived trial, considered by the judge.

8 2. A count charging any offense of aggravated child kidnapping  
9 of a particular individual may be joined in an indictment or  
10 information and tried with one or more counts charging alternatively  
11 any other aggravated child kidnapping or offense other than  
12 aggravated child kidnapping committed against that individual. The  
13 state shall not be required to make an election as to the alternative  
14 count on which it will proceed. This subsection in no way limits the  
15 right to try in the conjunctive, where they are properly joined under  
16 subsection 1 of this section, either separate offenses other than  
17 aggravated child kidnapping or separate offenses of aggravated child

18 kidnapping committed against different individuals.

19           3. When a defendant has been charged and proven before trial  
20 to be a prior offender pursuant to chapter 558, RSMo, so that the judge  
21 shall assess punishment and not a jury for an offense other than  
22 aggravated child kidnapping, that offense may be tried and submitted  
23 to the trier together with any aggravated child kidnapping charge with  
24 which it is lawfully joined. In such case the judge will assess  
25 punishment on any offense joined with a aggravated child kidnapping  
26 charge according to law and, when the trier is a jury, it shall be  
27 instructed upon punishment on the charge of aggravated child  
28 kidnapping in accordance with section 565.410.

29           4. When the state waives the death penalty for a aggravated child  
30 kidnapping offense, that offense may be tried and submitted to the trier  
31 together with any other charge with which it is lawfully joined.

          565.410. 1. Where aggravated child kidnapping is charged but  
2 not submitted or where the state waives the death penalty, the  
3 submission to the trier and all subsequent proceedings in the case shall  
4 proceed as in all other criminal cases with a single stage trial in which  
5 guilt and punishment are submitted together.

6           2. Where aggravated child kidnapping is submitted to the trier  
7 without a waiver of the death penalty, the trial shall proceed in two  
8 stages before the same trier. At the first stage the trier shall decide  
9 only whether the defendant is guilty or not guilty of any submitted  
10 offense. The issue of punishment shall not be submitted to the trier at  
11 the first stage. If an offense is charged other than aggravated child  
12 kidnapping in a count together with a count of aggravated child  
13 kidnapping, the trial judge shall assess punishment on any such offense  
14 according to law, after the defendant is found guilty of such offense and  
15 after he finds the defendant to be a prior offender pursuant to chapter  
16 558, RSMo.

17           3. If the trier at the first stage of a trial where the death penalty  
18 was not waived finds the defendant guilty of aggravated child  
19 kidnapping, a second stage of the trial shall proceed at which the only  
20 issue shall be the punishment to be assessed and declared. Evidence in  
21 aggravation and mitigation of punishment, including but not limited to  
22 evidence supporting any of the aggravating or mitigating  
23 circumstances listed in subsection 2 or 3 of section 565.415, may be

24 presented subject to the rules of evidence at criminal trials. Such  
25 evidence may include, within the discretion of the court, evidence  
26 concerning the victim and the impact of the crime upon the family of  
27 the victim and others. Rebuttal and surrebuttal evidence may be  
28 presented. The state shall be the first to proceed. If the trier is a jury  
29 it shall be instructed on the law. The attorneys may then argue the  
30 issue of punishment to the jury, and the state shall have the right to  
31 open and close the argument. The trier shall assess and declare the  
32 punishment at life imprisonment without eligibility for probation,  
33 parole, or release except by act of the governor:

34 (1) If the trier finds by a preponderance of the evidence that the  
35 defendant is mentally retarded; or

36 (2) If the trier does not find beyond a reasonable doubt at least  
37 one of the statutory aggravating circumstances set out in subsection 2  
38 of section 565.415; or

39 (3) If the trier concludes that there is evidence in mitigation of  
40 punishment, including but not limited to evidence supporting the  
41 statutory mitigating circumstances listed in subsection 3 of section  
42 565.415, which is sufficient to outweigh the evidence in aggravation of  
43 punishment found by the trier; or

44 (4) If the trier decides under all of the circumstances not to  
45 assess and declare the punishment at death. If the trier is a jury it  
46 shall be so instructed.

47 If the trier assesses and declares the punishment at death it shall, in its  
48 findings or verdict, set out in writing the aggravating circumstance or  
49 circumstances listed in subsection 2 of section 565.415 which it found  
50 beyond a reasonable doubt. If the trier is a jury it shall be instructed  
51 before the case is submitted that if it is unable to decide or agree upon  
52 the punishment the court shall assess and declare the punishment at  
53 life imprisonment without eligibility for probation, parole, or release  
54 except by act of the governor or death. The court shall follow the same  
55 procedure as set out in this section whenever it is required to  
56 determine punishment for aggravated child kidnapping.

57 4. Upon written agreement of the parties and with leave of the  
58 court, the issue of the defendant's mental retardation may be taken up  
59 by the court and decided prior to trial without prejudicing the  
60 defendant's right to have the issue submitted to the trier of fact as

61 provided in subsection 3 of this section.

62 5. As used in this section, the terms "mental retardation" or  
63 "mentally retarded" refer to a condition involving substantial  
64 limitations in general functioning characterized by significantly  
65 subaverage intellectual functioning with continual extensive related  
66 deficits and limitations in two or more adaptive behaviors such as  
67 communication, self-care, home living, social skills, community use,  
68 self-direction, health and safety, functional academics, leisure and  
69 work, which conditions are manifested and documented before eighteen  
70 years of age.

71 6. The provisions of this section shall only govern offenses  
72 committed on or after August 28, 2007.

565.415. 1. In all cases of aggravated child kidnapping for which  
2 the death penalty is authorized, the judge in a jury-waived trial shall  
3 consider, or he or she shall include in his or her instructions to the  
4 jury for it to consider:

5 (1) Whether a statutory aggravating circumstance or  
6 circumstances enumerated in subsection 2 of this section is established  
7 by the evidence beyond a reasonable doubt; and

8 (2) If a statutory aggravating circumstance or circumstances is  
9 proven beyond a reasonable doubt, whether the evidence as a whole  
10 justifies a sentence of death or a sentence of life imprisonment without  
11 eligibility for probation, parole, or release except by act of the  
12 governor. In determining the issues enumerated in subdivisions (1) and  
13 (2) of this subsection, the trier shall consider all evidence which it finds  
14 to be in aggravation or mitigation of punishment, including evidence  
15 received during the first stage of the trial and evidence supporting any  
16 of the statutory aggravating or mitigating circumstances set out in  
17 subsections 2 and 3 of this section. If the trier is a jury, it shall not be  
18 instructed upon any specific evidence which may be in aggravation or  
19 mitigation of punishment, but shall be instructed that each juror shall  
20 consider any evidence which he or she considers to be aggravating or  
21 mitigating.

22 2. Statutory aggravating circumstances for an aggravated child  
23 kidnapping offense shall be limited to the following:

24 (1) The offense was committed by a person with a prior record  
25 of conviction for aggravated child kidnapping, or the offense was



26 committed by a person who has one or more serious assaultive criminal  
27 convictions;

28 (2) The aggravated child kidnapping offense was committed  
29 while the offender was engaged in the commission or attempted  
30 commission of another unlawful kidnapping;

31 (3) The offender by his act of aggravated child kidnapping  
32 knowingly created a great risk of death to more than one person by  
33 means of a weapon or device which would normally be hazardous to the  
34 lives of more than one person;

35 (4) The offender committed the offense of aggravated child  
36 kidnapping for himself or another, for the purpose of receiving money  
37 or any other thing of monetary value from the victim of the kidnapping  
38 or another;

39 (5) The offender caused or directed another to commit  
40 aggravated child kidnapping or committed aggravated child  
41 kidnapping as an agent or employee of another person;

42 (6) The aggravated child kidnapping was committed for the  
43 exploitation of the child for the financial benefit of the offender or to  
44 create child pornography;

45 (7) The kidnapped individual was a witness or potential witness  
46 in any past or pending investigation or past or pending prosecution,  
47 and was kidnapped as a result of his status as a witness or potential  
48 witness;

49 (8) The aggravated child kidnapping was committed for the  
50 purpose of causing or attempting to cause a person to refrain from  
51 initiating or aiding in the prosecution of a felony offense defined in  
52 chapter 195, RSMo;

53 (9) The aggravated child kidnapping was committed during the  
54 commission of a crime which is part of a pattern of criminal street gang  
55 activity as defined in section 578.421, RSMo;

56 (10) The offender permitted another person to commit acts  
57 described in subdivisions (a) or (b) of subsection 2 of section 565.400  
58 during the commission of the offense;

59 (11) The aggravated child kidnapping was committed  
60 outrageously, horribly, or inhumanely in that it involved brutality,  
61 torture, depravity of mind, or extreme violence against the victim.

62 3. Statutory mitigating circumstances shall include the following:

63           (1) The defendant has no significant history of prior criminal  
64 activity;

65           (2) The aggravated child kidnapping was committed while the  
66 defendant was under the influence of extreme mental or emotional  
67 disturbance;

68           (3) The capacity of the defendant to appreciate the criminality  
69 of his conduct or to conform his conduct to the requirements of law was  
70 substantially impaired;

71           (4) The age of the defendant at the time of the crime;

72           (5) The length of time for which the defendant kidnapped the  
73 child.

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Bill

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